Supreme Court, U.S.
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No. 07-194

In The

Supreme Court of the United States

TAMARA GOMEZ,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a passenger in a vehicle stopped by a police officer challenge the stop on Fourth Amendment grounds? This same question has been decided in the affirmative by this Court on June 18, 2007, in *Brendlin v. California,* 551 U.S. ___ (2007).

2. Was it objectively reasonable under the Fourth Amendment for a police officer to stop a vehicle because he believed that a card suspended from the rearview mirror, which measured four by six inches, obstructed the driver's view through the windshield?

PARTIES TO PROCEEDINGS

The parties to the proceedings in the California Court of Appeal were the State of California and petitioner Tamara Gomez. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Tamara Gomez, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Sixth Appellate District, filed on March 7, 2007.

OPINION BELOW

The opinion of the California Court of Appeal, which was unpublished, issued on March 7, 2007, and is attached as Appendix A. The California Supreme Court's one-page order denying review is attached as Appendix B.

JURISDICTION

The decision of the California Court of Appeal for which petitioner seeks review issued on March 7, 2007. The California Supreme Court's order denying petitioner's timely petition for discretionary review was filed on May 16, 2007. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court. Thus, petitioner may invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fourteenth Amendment

> No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 26, 2005, petitioner was charged under California law with possessing a controlled substance for sale, a felony, possessing drug paraphernalia, a misdemeanor, and possessing 28.5 grams or less of marijuana, a misdemeanor. Her motion to suppress evidence was denied on October 21, 2005. On December 9, 2005, the jury returned its verdict of guilty on all three charges.

In the California Court of Appeal, petitioner argued that her motion to suppress should have been granted. She contended under the Fourth Amendment that the stop was unlawful. She also explained that the California Supreme Court's decision in *People v. Brendlin*, 38 Cal.4th 1107, 136 P.3d 845 (2006) had been wrongly decided because it held that a passenger in a vehicle that is stopped by police may

not challenge the stop on Fourth Amendment grounds. The California Court of Appeal affirmed the judgment.

Petitioner sought discretionary review of the Fourth Amendment issue in the California Supreme Court, making the same federal constitutional argument and citing the same authorities she had presented to the California Court of Appeal. Pet. for Rev., at pp. 18-20. The California Supreme Court summarily denied review without issuing an opinion. App. B.

REASON FOR GRANTING THE PETITION

Petitioner was a passenger in a car stopped by a police officer. The police officer testified at the suppression hearing that he stopped the car because he believed that a card measuring four by six inches, which was suspended from the rearview mirror, obstructed the driver's view. The police officer's search of petitioner produced contraband.

Petitioner contends that the California Court of Appeal erred in finding the stop lawful under the Fourth Amendment because the driver had broken no law. She argued in the Court of Appeal in reliance on *People v. White*, 107 Cal.App.4th 636, 132 Cal.Rptr.2d 371 (2003) that the police officer's belief was not objectively reasonable that the card obstructed the driver's view of the road. *Id.*, at p. 642. She also argued pursuant to *United States v. King*, an Alaska case, 244 F.3d 736 (2001) that California's Vehicle Code section 26708, which was similar to an Anchorage Municipal Code, was not violated, so long as the card or placard was not affixed to the windshield. *Id.*, at p. 740.

The California Court of Appeal considered the merits of appellant's arguments that the stop was unlawful in a footnote. It distinguished *White*, in which the officer did not testify that the air freshener obstructed the driver's view, from this case, in which the officer testified that he believed the four-by-six-inch card did so. App. A, p. 5, fn. 2. The Court of Appeal's conclusion was wrong because the officer's testimony was objectively unreasonable by any measure that the card obstructed the driver's view.

While *Brendlin v. California* was pending in this Court, the California Court of Appeal, in reliance in part on *People v. Fisher*, 38 Cal.App.4th 338, 45 Cal.Rptr.2d 57 (1995), affirmed the denial of petitioner's motion to suppress, holding that petitioner had not been detained for Fourth Amendment purposes because as a passenger in a vehicle stopped by a police officer her privacy rights had not been invaded. Opn., pp. 4-5.

The California Court of Appeal's decision in petitioner's case is inconsistent with this Court's holding in *Brendlin*, namely, that a passenger in a vehicle stopped by police was seized and entitled to challenge the stop. Slip Opn., p. 13. For this reason, this Court should grant this petition for certiorari, vacate the judgment, and remand the case to the California Court of Appeal for proceedings consistent with *Brendlin*.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: August 10, 2007

Respectfully submitted,

GLORIA C. COHEN
Counsel for the Petitioner

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APPENDIX A

Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Tamara GOMEZ, Defendant and Appellant.

No. **I029858.**

(Santa Clara County Super. Ct. No. FF510601).

March 7, 2007.

Allan Yannow, Office of the Attorney General, San Francisco, CA, Plaintiff and Respondent.

Gloria Cohen, Oakland, CA, Sixth District Appellate Program, Santa Clara, CA, for Defendant and Appellant.

ELIA, J.

Defendant Tamara Gomez was convicted by a jury of possession of methamphetamine for sale, possession of drug paraphernalia, and possession of 28.5 grams or less of marijuana. (Health & Saf.Code, §§ 11378, 11364, 11357, subd. (b).) On appeal, she contends that the superior court erred in denying her motion to suppress evidence under Penal Code section 1538.5. She further challenges a jury instruction given on the meaning of "sale" in possession for sale, and she asserts sentencing error in the order that she pay attorney fees as a condition of probation. We find the last contention to be meritorious and reverse on that ground alone.

Background

At about 10 p.m. on April 10, 2005, Erik Tiner, a corporal with the police department in Gilroy, was on patrol in an unmarked police car when he noticed a driver,

Noel Lara, make two quick right turns. It appeared to Corporal Tiner that the driver had seen him and was avoiding contact with him. Lara then pulled into a closed gas station and left again a few seconds later. Corporal Tiner followed the car a short distance more and then stopped the driver for having something hanging from the rearview mirror. Defendant was a passenger in Lara's car.

Lara and defendant both told Corporal Tiner that they had no identification. After a backup officer arrived, Corporal Tiner asked defendant to step out of the car. He then "asked her if she would mind emptying her pockets," because he suspected that she in fact had identification with her. While she was complying, defendant began fidgeting and shaking her leg, and then a plastic baggie fell out of her pants leg. Corporal Tiner believed that the baggie contained methamphetamine and told defendant to give it to him. Defendant did so, and Corporal Tiner placed her under arrest.

At the police department Corporal Tiner asked Officer Diana Mora to perform a strip search of defendant. In the course of that search defendant handed the officer a baggie containing marijuana residue, another baggie, a partially smoked marijuana cigarette (a "roach"), and a pipe of the type used to smoke methamphetamine. Laboratory analyses revealed that the methamphetamine in the first baggie weighed 6.04 grams; the baggie discovered during the strip search contained methamphetamine weighing 13.71 grams. During trial an expert testified that the quantity of methamphetamine recovered from defendant was typical for a small-to mid-level dealer; the two baggies together contained 380 usable amounts. The witness therefore concluded that the drugs had been possessed for sale. He admitted, however, that it takes more of the substance to

smoke it in a pipe, because more of it is lost in that process than if it is snorted.

Defendant was charged with possession of methamphetamine for sale (Health & Saf.Code, § 11378), possession of controlled substance paraphernalia (the pipe), a misdemeanor (Health & Saf.Code, § 11364), and possession of 28.5 grams or less of marijuana, a misdemeanor (Health & Saf.Code, § 11357, subd. (b)). She unsuccessfully moved to suppress evidence under Penal Code section 1538.5 and proceeded to trial.

At trial defendant testified in her own behalf. She said that when she noticed that Lara and she were being followed by the police, she was not especially concerned because she had only a pipe and a "roach" on her. When they reached the gas station she put these items inside her pants. After the patrol car's lights were on, Lara put the baggies of methamphetamine in front of her purse at her feet. Defendant considered Lara a good friend. But she was afraid that Lara would tell the police that the drugs were hers, so she put them down her pants, not realizing that there were two baggies rather than one.

Defendant's description of the encounter with Corporal Tiner was consistent with his. She stated that after she told him she had no identification, the officer asked her if she "would mind stepping out of the vehicle" so that he could search for weapons. Defendant thought he was going to search the car. Corporal Tiner then requested that she go to the front of the car. He asked her if she "would have a problem with removing anything from [her] jacket pockets or [her] pant pockets." Defendant said she did not, and she put some items from her jacket pocket on the hood. Then he asked her if she "would mind if he did . . . a

pat, a frisk, or whatever, pat-down." Defendant asked him why, and the officer explained that he believed she might have identification. While trying to show him that she had none, she felt the bag coming out of her pants leg. Upon her arrest Corporal Tiner asked if she had anything that should not be brought into the police car or the station, and she told him about the methamphetamine pipe and the roach. Until the strip search she did not know she had a second bag inside her pants. Defendant insisted that she had not intended to sell the drugs, or even to possess them originally; she had intended only to conceal them. She did admit that she was a methamphetamine user; she saved part of the money that her husband gave her for buying groceries and paying bills, and she used the extra to buy methamphetamine. Sometimes she would share her supply with friends; on other occasions, they would "return the favor" to her. Defendant clarified, however, that "just because they give me some now, they don't usually expect or demand of me to give them when I have it. . . . Whoever was the one who had it, provided it. That was the circle of friends." She bought methamphetamine for herself, she said, not to give it to her friends.

The jury returned a verdict of guilty on all three counts. The trial court suspended imposition of sentence and granted defendant four years' probation, on condition that she serve six months in the county jail. This appeal followed.

Discussion

1. Motion to Suppress

Defendant first argues that her conviction must be overturned because the evidence recovered at the scene of

the traffic stop should have been suppressed. In evaluating this contention we adhere to settled principles governing appellate review of Penal Code section 1538.5 rulings. "In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated." (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Ayala* (2000) 24 Cal.4th 243, 279.) "We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact [which] is subject to independent review." (*People v. Ramos* (2004) 34 Cal.4th 494, 505.)

Defendant's challenge in this case rests on the assertion that Corporal Tiner had no lawful basis for stopping Lara's car. Vehicle Code section 26708, she argues, does not prohibit any object hanging from a rearview mirror, and the object in question, which was approximately four inches by six inches in size, was not large enough to obstruct Lara's view through the windshield. The People respond that defendant was not detained by either the stop or the request to see her identification.

As defendant points out, the United States Supreme Court recently granted review of *People v. Brendlin* (2006) 38 Cal.4th 1107, where our Supreme Court held that a passenger in a car that is pulled over for a traffic stop is not "seized" within the meaning of the Fourth Amendment absent circumstances indicating that the passenger was the focus of the officer's investigation or show of authority. Although *Brendlin* is no longer authority for the People's position, *People v. Saunders* (2006) 38 Cal.4th 1129 takes

the same view. In *Saunders* the Supreme Court found that a seizure of the passenger occurred not when the officers stopped the truck, but when one officer approached the truck and ordered the passenger to get out. (*Id.* at p. 1134.) And in *People v. Fisher* (1995) 38 Cal.App.4th 338 this court held that a passenger is not detained when officers stop a vehicle because a passenger's privacy rights are not implicated in a traffic stop. As in the present case, Fisher had no indication that the red light on the police car was directed at him. The defendant made no attempt to leave and the officer exercised no control over him before asking him to step out of the car. We held that "in constitutional terms a passenger is not 'lawfully stopped' [citation], seized, or detained . . . merely because the vehicle in which he or she is riding is stopped for a traffic violation." (*Id.* at p. 344.)

Similarly, we conclude in this case that no seizure of defendant was effected by the stop of Lara's car. Corporal Tiner said nothing to defendant before he asked her to step out of the car and asked her if "she would mind" emptying her pockets so that he could ascertain that she did not have identification with her.[1] Defendant was not unlawfully detained by the stop itself.[2]

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[1] Defendant does not contend that the request to step out of the car was a detention.

[2] Even if we were to address the issue on the merits, we would not reach the conclusion that the stop was unlawful. In the case on which defendant relies, *People v. White* (2003) 107 Cal.App.4th 636, 642, the officer did not testify that he believed the air freshener hanging from the rearview mirror obstructed the driver's view. By contrast, in this case the People presented testimony from Corporal Tiner that he believed the four-by-six-inch object was impairing Lara's clear view.

Defendant alternatively contends that Corporal Tiner unlawfully detained her by making a "show of authority" when he "told" her to stand by the hood of the car. She points out that it was 10:00 at night, the gas station was closed, and as a woman, she "would have been fearful of exposing herself to the risk of harm alone on the street late at night. Even if appellant had money and a cell phone – the record is silent – it was dark and she was still some distance from home." In these circumstances, defendant argues, she did not voluntarily consent to stand by the hood of Lara's car.

In denying defendant's suppression motion, the trial court found defendant's act of emptying her pockets "to be a voluntary act and not as submission to authority." As defendant recognizes, this was a factual determination; but instead of showing that substantial evidence does not support the trial court's findings, she merely cites the circumstances leading to the opposite conclusion. It is the province of the superior court, not this court, to weigh the evidence and draw factual inferences; on appeal, "all factual conflicts must be resolved in the manner most favorable to the court's disposition on the motion." (*People v. Martin* (1973) 9 Cal.3d 687, 692.) The superior court here believed Corporal Tiner's hearing testimony that he asked defendant to get out of the car, that he "asked if she would mind emptying her pockets on the hood of the vehicle" so he could ascertain whether she was carrying identification, and that defendant complied without objection to each of these requests.

This testimony provides substantial evidence of the consensual nature of the initial police encounter with defendant. (Cf. *People v. Franklin* (1987) 192 Cal.App.3d 935, 941 ["Where a consensual encounter has been found,

police may inquire into the contents of pockets . . . ask for identification . . . or request the citizen to submit to a search"].) There was no direct accusation that defendant was carrying a controlled substance, no display of a weapon, no physical touching, and no demand either in words or tone of voice that defendant stand at the hood and empty her pockets. Unfortunately for defendant, during that consensual encounter the methamphetamine slipped out of her pants, thus providing probable cause for her arrest.

2. Jury Instruction

At trial the court instructed the jury on possession for sale (count one) with a modified version of CALJIC No. 12.01, including the following definition of "sale": "'Sale' means any exchange of methamphetamine, a controlled substance, for cash, favors, services, goods, other noncash benefits, or gift." Defendant contends that it was error to state "that selling methamphetamine included giving it away as a gift," because neither Health and Safety Code section 11378 nor the standard CALJIC instruction prohibits possession "with the purpose of giving it as a gift."

Defendant's argument is based on a misreading of the instruction given. The court did not say that bestowing a gift on someone constitutes a sale; it included "gift" within the list of things for which one could *exchange* the controlled substance. Although it is awkward to phrase the instruction to suggest that one can sell a product in exchange for a "gift," we presume the jury was capable of understanding that the intended meaning was that the recipient of the drugs would at some point "give" defendant something in return. Even defendant's own

testimony, in which she explained that in her circle of friends, "[w]hoever was the one who had it, provided it," could have led the jury to infer that defendant expected to share in someone else's supply in exchange for her providing methamphetamine when she had some to share. The jurors were not obligated to believe that on this occasion she intended to share 19.75 grams, or 380 "usable amounts," without expectation of receiving some in return on a future occasion. Reversal is not required.

3. Attorney Fees

At the sentencing hearing the trial court suspended imposition of sentence and placed defendant on formal probation for four years with a number of conditions, including a six-month jail term and payment of various fees and fines. Among those fees were "attorney's fees not to exceed $1,000." The court also referred defendant to the Department of Revenue "for a determination of her ability to pay the fines and fees." When asked if she accepted probation on the terms stated, defendant responded affirmatively.

A Defendant contends that the requirement that she pay attorney fees as a condition of probation was "absolutely prohibited" and therefore must be struck from the disposition. She further argues that the record contains insufficient evidence that she could afford to pay $1,000 or that the amount ordered represented the actual cost to the county for the legal services she received. We need not address defendant's second point because the court did not make a determination of her ability to pay $1,000; indeed, it referred her to the Department of Revenue for that very purpose. The first point, however, has merit.

The People respond that defendant misrepresents the court's order as directing her to pay $1,000 in legal fees. They further contend that defendant's challenge is premature because the trial court only *referred* defendant to the Department of Revenue for a determination of her ability to pay. The People also suggest that defendant would be "worse off" if the court had actually referred defendant without setting a limit on the amount she might be found able to pay.

Both parties have misstated the sentencing order. The trial court did not order defendant to pay a set amount, but it did order her to pay *up to* $1,000, and this was clearly one of the listed conditions of probation. Although it referred defendant to the "Department of Revenue" for a "determination of her ability to pay," it did not order a report from that agency or subsequently hold a hearing or make the required determination itself.[3]

Penal Code section 987.8 provides that "[i]n any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." (Pen.Code, § 987.8, subd. (b).)[4] "If the court determines that the

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[3] Under Penal Code section 987.8, only the court may "make a determination" regarding a defendant's ability to pay. (See Pen.Code, § 987.8, subd. (b).)

[4] Penal Code section 987.8, subdivision (b) states: "(b) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the

(Continued on following page)

defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county. . . ."[5] (Pen.Code, § 987.8, subd. (e).)

It is clear that the payment of attorney fees may not be imposed as a condition of probation. (*People v. Faatiliga* (1992) 10 Cal.App.4th 1276, 1280, disapproved on another point in *People v. Flores* (2006) 30 Cal.4th 1059, 1067; *In re Elizabeth S.* (1982) 138 Cal.App.3d 450, 454.) And a determination that a defendant has the ability to pay is a prerequisite for entry of an attorney fees order. (Pen.Code, § 987.8, subd. (e).) The Supreme Court has approved of remand as a remedy for correction of errors of a similar nature, even after expiration of the six months set forth in subdivision (b) of section 987.8. (*People v. Flores, supra,* 30 Cal.4th at p. 1068.) Among other things, the court in

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present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

[5] "'Ability to pay' means the overall capability of the defendant to reimburse the costs or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable future financial position. . . . [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (Pen.Code, § 987.8, subd. (g)(2).)

Flores reasoned that the legislative history of Penal Code section 987.8, subdivision (b) "clearly reveals [that] the Legislature intended to increase the ability of the trial courts to order reimbursement, not to limit it, much less to nullify it." (*Id.* at p. 1065.) Accordingly, we will remand the matter to the trial court to enable it either to make the determination described in Penal Code section 987.8 regarding appellant's ability to pay attorney fees or to strike the order.

Disposition

The judgment is reversed. The matter is remanded to the trial court with instructions to vacate its previous order directing defendant to pay up to $1,000 in attorney fees. The court shall then either conduct a noticed hearing on appellant's ability to pay attorney's fees pursuant to Penal Code section 987.8 or direct the clerk of the court to amend the abstract of judgment to strike the attorney's fee order. The court may impose a new order to pay attorney fees if it determines that defendant has the ability to pay. The remainder of the judgment is unaffected by this decision.

WE CONCUR: RUSHING, P.J., and PREMO, J.

APPENDIX B

Court of Appeal, Sixth Appellate District – No. H029858
S151812

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

TAMARA GOMEZ, Defendant and Appellant.

(Filed May 16, 2007)

The petition for review is denied.

GEORGE
Chief Justice

APPENDIX C

California Vehicle Code Section 26708

(a)(1) No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied upon the windshield or side or rear windows.

(2) No person shall drive any motor vehicle with any object or material placed, displayed, installed, affixed, or applied in or upon the vehicle which obstructs or reduces the driver's clear view through the windshield or side windows. (3) This subdivision applies to a person driving a motor vehicle with the driver's clear vision through the windshield, or side or rear windows, obstructed by snow or ice.

(b) This section does not apply to any of the following:

(1) Rearview mirrors.

(2) Adjustable nontransparent sunvisors which are mounted forward of the side windows and are not attached to the glass.

(3) Signs, stickers, or other materials which are displayed in a 7-inch square in the lower corner of the windshield farthest removed from the driver, signs, stickers, or other materials which are displayed in a 7-inch square in the lower corner of the rear window farthest removed from the driver, or signs, stickers, or other materials which are displayed in a 5-inch square in the lower corner of the windshield nearest the driver.

(4) Side windows which are to the rear of the driver.

(5) Direction, destination, or termini signs upon a passenger common carrier motor vehicle or a schoolbus, if

those signs do not interfere with the driver's clear view of approaching traffic.

(6) Rear window wiper motor.

(7) Rear trunk lid handle or hinges.

(8) The rear window or windows, when the motor vehicle is equipped with outside mirrors on both the left- and right-hand sides of the vehicle that are so located as to reflect to the driver a view of the highway through each mirror for a distance of at least 200 feet to the rear of the vehicle.

(9) A clear, transparent lens affixed to the side window opposite the driver on a vehicle greater than 80 inches in width and which occupies an area not exceeding 50 square inches of the lowest corner toward the rear of that window and which provides the driver with a wide-angle view through the lens.

(10) Sun screening devices meeting the requirements of Section 26708.2 installed on the side windows on either side of the vehicle's front seat, if the driver or a passenger in the front seat has in his or her possession a letter or other document signed by a licensed physician and surgeon certifying that the person must be shaded from the sun due to a medical condition, or has in his or her possession a letter or other document signed by a licensed optometrist certifying that the person must be shaded from the sun due to a visual condition. The devices authorized by this paragraph shall not be used during darkness.

(11) An electronic communication device affixed to the center uppermost portion of the interior of a windshield within an area that is not greater than 5 inches square, if the device provides either of the following:

(A) The capability for enforcement facilities of the Department of the California Highway Patrol to communicate with a vehicle equipped with the device.

(B) The capability for electronic toll and traffic management on public or private roads or facilities.

(c) Notwithstanding subdivision (a), transparent material may be installed, affixed, or applied to the topmost portion of the windshield if the following conditions apply:

(1) The bottom edge of the material is at least 29 inches above the undepressed driver's seat when measured from a point 5 inches in front of the bottom of the backrest with the driver's seat in its rearmost and lowermost position with the vehicle on a level surface.

(2) The material is not red or amber in color.

(3) There is no opaque lettering on the material and any other lettering does not affect primary colors or distort vision through the windshield.

(4) The material does not reflect sunlight or headlight glare into the eyes of occupants of oncoming or following vehicles to any greater extent than the windshield without the material.

(d) Notwithstanding subdivision (a), clear, colorless, and transparent material may be installed, affixed, or applied to the front side windows, located to the immediate left and right of the front seat if the following conditions are met:

(1) The material has a minimum visible light transmittance of 88 percent.

(2) The window glazing with the material applied meets all requirements of Federal Motor Vehicle Safety Standard No. 205 (49 C.F.R. 571.205), including the specified minimum light transmittance of 70 percent and the abrasion resistance of AS-14 glazing, as specified in that federal standard.

(3) The material is designed and manufactured to enhance the ability of the existing window glass to block the sun's harmful ultraviolet A rays.

(4) The driver has in his or her possession, or within the vehicle, a certificate signed by the installing company certifying that the windows with the material installed meet the requirements of this subdivision and identifies the installing company and the material's manufacturer by full name and street address, or, if the material was installed by the vehicle owner, a certificate signed by the material's manufacturer certifying that the windows with the material installed according to manufacturer's instructions meets the requirements of this subdivision and identifies the material's manufacturer by full name and street address.

(5) If the material described in this subdivision tears or bubbles, or is otherwise worn to prohibit clear vision, it shall be removed or replaced.

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No. 07-194

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

TAMARA GOMEZ, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a remand for reconsideration in light of *Brendlin* v. *California*, 551 U.S. __, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007), is appropriate, given that the state court ruled that petitioner lacked standing, and, alternatively, that the stop of the vehicle in which petitioner rode was reasonable under the Fourth Amendment.

2. Whether certiorari is appropriate to review the state court's determination that a police officer had probable cause to believe that a four-by-six-inch object suspended from the vehicle's rear view mirror obscured the driver's view in violation of California Vehicle Code section 26708(a)(2).

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IN THE SUPREME COURT OF THE UNITED STATES

No. 07-194

TAMARA GOMEZ, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

OPINION BELOW

The Superior Court for the State of California, County of Santa Clara, denied petitioner's motion to suppress evidence obtained after a police officer stopped the car in which petitioner was a passenger. A jury convicted petitioner of possession of methamphetamine for sale, possession of drug paraphernalia, and possession of 28.5 grams or less of marijuana. Cal. Health & Safety Code §§ 11379, 11364, 11357(b). (App. A to Pet. Cert. 1.) The Court of Appeal affirmed the conviction, finding that petitioner lacked standing to challenge the stop of the vehicle. The court also held that if it were to reach the merits it would find that the stop was lawful. (App. A. to Pet. Cert. 6 & fn. 2.) The California Supreme Court denied review. (App. B. to Pet. Cert.)

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257 (a).

STATEMENT OF FACTS

The Court of Appeal described the facts of the investigative stop and resulting arrest as follows:

> At about 10 p.m. on April 10, 2005, Erik Tiner, a corporal with the police department in Gilroy, was on patrol in an unmarked police car when he noticed a driver, Noel Lara, make two quick right turns. It appeared to Corporal Tiner that the driver had seen him and was avoiding contact with him. Lara then pulled into a closed gas station and left again a few seconds later. Corporal Tiner followed the car a short distance more and then stopped the driver for having something hanging from the rearview mirror.[1] [Petitioner] was a passenger in Lara's car.
>
> Lara and [petitioner] both told Corporal Tiner that they had no identification. After a backup officer arrived, Corporal Tiner asked [petitioner] to step out of the car. He then "asked her if she would mind emptying her pockets," because he suspected that she in fact had identification with her. While she was complying, [petitioner] began fidgeting and shaking her leg, and then a plastic baggie fell out of her pants leg. Corporal Tiner believed that the baggie contained methamphetamine and told defendant to give it to him. [Petitioner] did so, and Corporal Tiner placed her under arrest.
>
> . . .
>
> At trial [petitioner] testified in her own behalf. She said that when she noticed that Lara and she

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1. The Court of Appeal observed elsewhere in its opinion that "the People presented testimony from Corporal Tiner that he believed the four-by-six-inch object was impairing Lara's clear view." (App. A to Pet. Cert. 6, fn. 2; see 1 Rep.'s Tr. 4-6.)

were being followed by the police, she was not especially concerned because she had only a pipe and a "roach" on her. When they reached the gas station she put these items inside her pants. After the patrol car's lights were on, Lara put the baggies of methamphetamine in front of her purse at her feet. [Petitioner] considered Lara a good friend. But she was afraid that Lara would tell the police that the drugs were hers, so she put them down her pants, not realizing that there were two baggies rather than one.

[Petitioner's] description of the encounter with Corporal Tiner was consistent with his. She stated that after she told him she had no identification, the officer asked her if she "would mind stepping out of the vehicle" so that he could search for weapons. [Petitioner] thought he was going to search the car. Corporal Tiner then requested that she go to the front of the car. He asked her if she "would have a problem with removing anything from [her] jacket pockets or [her] pant pockets." [Petitioner] said she did not, and she put some items from her jacket pocket on the hood. Then he asked her if she "would mind if he did . . . a pat, a frisk, or whatever, pat-down." [Petitioner] asked him why, and the officer explained that he believed she might have identification. While trying to show him that she had none, she felt the bag coming out of her pants leg. Upon her arrest Corporal Tiner asked if she had anything that should not be brought into the police car or the station, and she told him about the methamphetamine pipe and the roach.

(App. A to Pet. Cert. 1-4 [footnote added].)

ARGUMENT

A REMAND IS NOT WARRANTED BECAUSE THE COURT OF APPEAL'S FINDING THAT THE STOP WAS LAWFUL WAS INDEPENDENT OF THE COURT'S RULING ON PETITIONER'S STANDING TO CHALLENGE THE STOP

In affirming the conviction, the Court of Appeal concluded that petitioner lacked standing to challenge the stop. It also stated in a footnote that had it reached the merits, it would not have found the stop unlawful. (App. A. to Pet. Cert. 6, fn. 2.) The trial court likewise had found the stop to be lawful. (1 Rep.'s Tr. 28.)

Petitioner argues that the Court of Appeal's ruling that she lacked standing to challenge the stop is inconsistent with *Brendlin* v. *California*, 551 U.S. __, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (*Brendlin*). In *Brendlin* the Court held that a passenger has standing under the Fourth Amendment to challenge the lawfulness of a car stop. *Id.* at 2406-07.

Petitioner asks that her case be remanded for proceedings consistent with *Brendlin*. (Pet. Cert. 4.) However, petitioner's standing to challenge the stop does not require a remand in her case. The Court of Appeal considered and rejected her claim that the stop was unlawful. Specifically, the Court of Appeal declared that it would not have found the stop unlawful, in light of the officer's testimony that he believed the four-by-six-inch object hanging from the rearview mirror obstructed or reduced the driver's clear view, a violation of California Vehicle Code section 26708(a)(2). (App. A. to Pet. Cert. 6, fn. 2; App. C to Pet. Cert.)

Accordingly, the Court of Appeal's decision to uphold

the trial court's denial of the suppression motion is unaffected by *Brendlin*. Thus, there is no basis on which to remand the case. The result necessarily would replicate the one already reached by the state court.

Petitioner's second question asks this Court to determine if the police had an objectively reasonable basis to stop the car. She does not claim that the Court of Appeal applied the wrong substantive standard in finding the stop was lawful. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren* v. *United States*, 517 U.S. 806, 810 (1996). The Court of Appeal's decision to uphold the stop did not conflict with that principle.

Nor has petitioner suggested any substantial basis on which to overturn the state court's application of the law to the record evidence. She cites *People* v. *White*, 107 Cal. App. 4th 636, 642, 132 Cal. Rptr. 2d 371 (2003), but that decision rejected an obstruction of view as probable cause for a stop where no officer testified to a belief that the driver's view was obstructed. Here, the testimony missing in *White* was supplied and credited by both the trial court and the Court of Appeal. Petitioner's probable cause claim is fact bound and not a substantial federal question requiring review.

Because *Brendlin* has no effect on the validity of the state court's decision upholding the stop of the vehicle, petitioner establishes no need for a remand. Furthermore, the Court of Appeal upheld the admission of the evidence seized from petitioner under established Fourth Amendment principles regulating car stops. There is no substantial federal question concerning the correctness of those principles or their application to this case. Accordingly, there is no basis for a writ of certiorari.

CONCLUSION

For the foregoing reasons respondent respectfully requests that the petition for writ of certiorari be denied.

Dated: October 24, 2007

Respectfully submitted,

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